



POLICE DEPARTMENT

September 19, 2019

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In the Matter of the Charges and Specifications :

- against - :

Police Officer Jimmie Moore :  
Tax Registry No. 925771 :  
Housing PSA 8 :

Case No.  
2018-18674

Police Officer Michael Heinz :  
Tax Registry No. 953959 :  
Housing PSA 8 :

Case No.  
2018-18672

-----X  
At: Police Headquarters  
One Police Plaza  
New York, NY 10038

Before: Honorable Nancy R. Ryan  
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB-APU: Di' Indra Forgenie, Esq.  
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To:

HONORABLE JAMES P. O'NEILL  
POLICE COMMISSIONER  
ONE POLICE PLAZA  
NEW YORK, NY 10038

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## CHARGES AND SPECIFICATIONS

### Disciplinary Case No. 2018-18674

1. Police Officer Jimmie Moore, on or about November 29, 2017, at approximately 1505, while assigned to PSA 8 and on duty, in the vicinity of East Tremont Avenue and Coddington Avenue, Bronx County, wrongfully used force, in that he unlawfully used pepper spray against Brandon Villacis without police necessity.

P.G. 221-02, Page 2, paras. 10-12

USE OF FORCE

2. Police Officer Jimmie Moore, on or about November 29, 2017, at approximately 1505, while assigned to PSA 8 and on duty, in the vicinity of East Tremont Avenue and Coddington Avenue, Bronx County, wrongfully used force, in that he improperly used pepper spray against Brandon Villacis without police necessity.

P.G. 221-07, Page 2

USE OF OLEORESIN CAPSICUM  
PEPPER SPRAY DEVICES

### Disciplinary Case No. 2018-18672

1. Police Officer Michael Heinz, on or about November 29, 2017, at approximately 1505, while assigned to PSA 8 and on duty, in the vicinity of East Tremont Avenue and Coddington Avenue, Bronx County, wrongfully used force, in that he punched Brandon Villacis in the face, without police necessity.

P.G. 221-02, Page 2, Prohibition 11

USE OF FORCE

## REPORT AND RECOMMENDATION

The above-named members of the Department appeared before me on August 5 and 6, 2019. Respondents, through their counsel, entered pleas of Not Guilty to the subject charges. The CCRB called Brandon Villacis as a witness and Respondents both testified on their own behalves. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having reviewed all of the evidence in this matter, I find Respondent Heinz Not Guilty. I further find Respondent Moore Not Guilty of Specification 1 and Guilty of Specification 2, and recommend a forfeiture of one vacation day.

## ANALYSIS

The following facts are not in dispute. At approximately 1530 hours on November 29, 2017, Respondent Police Officers Jimmie Moore and Michael Heinz, two anticrime officers who were in uniform in an unmarked police vehicle, conducted a routine traffic stop of Brandon Villacis. The validity of that stop is not disputed by the CCRB, though Villacis has denied committing traffic infractions. Villacis was, at the time, a habitual marijuana smoker and confirmed that there was marijuana visible in his vehicle. Though he was compliant in pulling over, he did not immediately step out of his vehicle when directed to do so by Respondent Heinz, who had approached the driver's window of Villacis' Honda Accord. Instead, he remained seat belted and continued to reach for documents in his glove compartment despite being directed not to do so. Ultimately, Respondent Heinz attempted to remove Villacis from the vehicle and an altercation ensued.

The nature and duration of that altercation and the question of Villacis' compliance or lack thereof form the crux of this dispute. It was agreed, though, that force was used during the encounter. Respondent Heinz confirmed that he did strike Villacis on the right side of his face and Respondent Moore confirmed that he deployed one burst of pepper spray. After the OC spray was utilized, Villacis began to exit the vehicle and ended up on the ground, where he was handcuffed and placed in a police van. EMS was not called to the scene. At the precinct, Villacis requested to be transported to the hospital.

Respondent Moore accompanied Villacis to Jacobi Medical Center, arriving at 1853 hours and remaining with him until his discharge five hours later. The hospital records indicate that his chief complaints were left wrist pain and nausea. "Mild redness to [the] left wrist" was noted. The records also detail that Villacis indicated his wrist pain had persisted "after being handcuffed by police earlier this week." Another page notes that the wrist pain resulted from

"trauma 1 week ago." A wrist X-ray was negative for fractures or dislocations; the injury was characterized as a likely strain. Villacis was given Tylenol for the pain and discharged. There is no mention of any facial abrasions or injury and no mention of pepper spray or eye irritation/injury. (Res. Ex. A)

According to Respondent Moore's arrest report, Villacis was charged with reckless driving, marijuana possession and resisting arrest. At trial, Villacis indicated he pled guilty only to disorderly conduct. (Tr. 120; CCRB Ex. 8)

The complainant, Brandon Villacis, testified before the tribunal. Villacis confirmed that the November 29, 2017, incident was not his first interaction with NYPD officers [REDACTED].<sup>1</sup> At the time of the incident, he was a habitual marijuana smoker, confirming that he smoked once or twice a day for approximately seven years. He smoked mostly at home, but also in his vehicle about twice a month. He denied having an addiction, though he agreed that he "smoked weed a lot at that time," offering that it improved his demeanor and made him "more happy in my situation at that time." (Tr. 12-16) He explained that he had been homeless, experiencing "housing difficulties" after residing [REDACTED] [REDACTED] for a time earlier that year. [REDACTED]  
[REDACTED]  
[REDACTED] (Tr. 58-61, 76-77, 82)

On the day of the incident, Villacis was driving home from [REDACTED] in the Bronx after dropping off his girlfriend at work at approximately 1500 hours. He had the vehicle registration in the glove compartment with his passport; his insurance had been lapsed for about

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<sup>1</sup> [REDACTED] [REDACTED] (Tr. 10)

a month at that time. He did not have his driver's license on him, testifying that it was lost approximately a week before after a vehicle break-in. (Tr. 17-18, 66-69, 92)

Villacis "[did not] remember" whether he was under the influence of drugs or alcohol while driving on this day. He specified that he had not had any alcohol. On direct, he "[did not] remember" whether he had smoked marijuana earlier that day or at the time he was pulled over. He subsequently insisted on cross examination that he "did not consume marijuana that day." He did recall smoking marijuana in the vehicle the day before and placing the unfinished joint in the center cup holder, which left a "pretty strong" odor in the car because the "strain was very potent." He characterized that unfinished joint as a "very small clip" and did not remember having any other marijuana on him when he was pulled over. (Tr. 18-20, 76, 82-83, 87, 134)

As he headed home, in the vicinity of East Tremont and Coddington Avenue, Villacis observed a van tailgating him in "heavy" traffic. He moved to the side of the road thinking the van would "get out of the way," but it continued behind him. He briefly drove in the bike lane "for two seconds," driving a few miles faster than the 25 mph limit, but not speeding to get back into the flow of traffic. He did not recall cutting off other vehicles to get back into traffic, but did remember that the van continued to tailgate him as he did so. He then noticed a strobe light and realized it might be police, which was confirmed when he heard sirens. (Tr. 20-23, 65-66)

Villacis wondered why he was being stopped, but insisted he immediately pulled over and waited for the officer to ask for license and registration. He did not remember if he took the keys out of the ignition while he waited for the officers to approach. A white male officer (Heinz) approached the driver's window and a black male officer (Moore) approached the passenger side. Villacis recounted that he rolled down both windows and immediately pointed out the clip of marijuana next to the cup holder. Respondent Heinz then asked for his license, registration and proof of insurance and Respondent Moore stuck his head inside the vehicle "like

he was smelling stuff." Villacis did not tell the officer his license had been stolen; he testified that he said, "no problem officer. I have it in my glove box. Allow me a minute to obtain this." The officer gave him some time, but then ordered him twice to step out of the vehicle as he was reaching for his ID. (Tr. 24-28, 34, 83-84)

Villacis, contending that he believed it was "more important than anything" for the officer to see his ID, admitted that he did not immediately step out of the car. Instead, he asked, "don't you need my identification to identify me?" He claimed the officer again directed him to step out of the vehicle and "before I knew it struck me in the face." (Tr. 28-29, 94-98, 101)

Villacis asserted he was following all commands and that he was going to retrieve his documents and step out of the vehicle, but contended the officer didn't "give me enough time to respond . . . before he struck me on my face repeatedly." He specified that while seat belted in his vehicle, he was struck with a closed fist by Respondent Heinz three to ten times over the course of about 90 seconds. He testified that during this time, Respondent Moore ran to the driver's side and began pepper spraying him as he remained seat belted inside. He initially suggested that he lost consciousness at some point during this altercation inside the vehicle, but clarified that he meant that he briefly experienced slightly blurred vision, slight memory loss and confusion while being punched repeatedly. He detailed that Respondent Heinz then unlocked the car door, pulled him out by his shirt and pants and threw him on the ground, ripping his clothing and undergarments. Villacis testified that Respondent Heinz continued to punch him in the face repeatedly, even though he was not resisting and pleaded with the officer to stop because he had a bad shoulder. He asserted that Respondent Moore was "just on standby...watching" as his partner punched him. (Tr. 29-33, 37-40, 104-10, 135) Villacis claimed that he was not doing anything with his feet while on the ground and that his hands were by his stomach. (Tr. 42)

Villacis did not remember exactly how many times he was struck in total, but alleged there were multiple punches to “my whole face.” He recounted suffering bruising all over his face, swelling on his nose and left jaw, and pain in the neck area. The pepper spray caused a “slight burn” in his eyes and blurry vision for up to an hour, though he conceded “it wasn’t heavy.” After he was handcuffed and put in the police van, he tried to rub his head on the seat and brush any residual spray onto his shoulder. (Tr. 34-37)

He initially testified that after he was handcuffed, he saw both Respondents searching his car. He later stated that Respondent Heinz searched the car while Respondent Moore stayed with him in the police van. (Tr. 42-44, 85, 111) At his December 2017 CCRB interview, Villacis had detailed that his vehicle was searched extensively and that he believed the officers were trying to “dig deeply...to try to get me” following a domestic dispute that had brought him into the precinct a few days earlier.<sup>2</sup> At trial, he stated he did not know whether the police had been following him for days at that time of this incident. He testified, “Police are always trying to find something against somebody for some type of cause...Police are always looking for something.” He initially stated he did not remember whether he said anything to Respondent when he was pulled over about whether the officers were following him because of a prior incident; he then denied saying anything to that effect. (Tr. 86-88)

Villacis was transported to the precinct, where he testified that he was given his phone to obtain a number for his phone call. He claimed that he used his phone to snap a few “quick selfie[s]” of his injuries at that time. These photos were offered into evidence as CCRB Exs. 3-5 and Villacis stated he was sure that these photos were taken on the day of the incident. At the

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<sup>2</sup> Villacis agreed he might have been at the precinct four days earlier on an unrelated matter. He provided more details at his December 2017 CCRB interview, where he stated “I just came out of that precinct like a week before this incident happened because I had a dispute with my girlfriend but we both dropped [the] charges.” (Tr. 85-86)

precinct, he requested EMS and Respondent Moore transported him to Jacobi Medical Center at approximately 1800 hours. (Tr. 43-44, 62-63)

The chief complaints Villacis reported to hospital personnel were left wrist pain<sup>3</sup> and nausea. He did not complain of shoulder pain or any eye issues, offering that he had great eyesight and that the shoulder pain had subsided. He made no mention of pepper spray or being punched. He believed that the medical staff would view him as "just another criminal coming through the doors" and would "not...assist me on what cops have done to me," especially given that Respondent Moore was present. He felt "very afraid" about Respondent Moore's presence, explaining that he did not find him trustworthy based on his conduct during the stop and noting that he had two guns on him. After being released from the hospital the same day, Villacis did not follow up for any additional medical treatment. He did not file a lawsuit in connection with the incident, though he stated he "should have." (Tr. 120-28, 136)

In contrast to Villacis' account where he was trying to comply with all directives and in no way resisted arrest, Respondents testified that he was not in any way compliant. Respondent Heinz remembered that on the afternoon of the incident, he was driving eastbound on West Tremont Avenue when he observed a Honda sedan, also going eastbound, drive into the bike lane for about five car lengths and into the bus lane. They both recalled that the driver of the sedan, sped up to approximately 35-40 mph in a 25 mph area, and moved back into the travel lane, failing to signal as he did so in moderate school-time traffic. They followed the car for a block and activated lights and sirens; the Honda pulled over in the bike lane. (Tr. 166-71, 191-99, 234-36, 252-56)

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<sup>3</sup> When he was interviewed by CCRB about this incident approximately three weeks after the incident, he said his wrist was sprained "from the cuffs being so tight and about a week before that when I was taken to Central Bookings, a cop threw me in the backseat." (Tr. 126)



Within a few seconds, Respondent Heinz approached the driver's window and Respondent Moore the passenger side. As they approached, they both immediately noticed a smell of marijuana. "Out of habit," Respondent Heinz immediately asked Villacis for license, registration and proof of insurance before even looking into the car. As he was saying this, both officers observed that Villacis was holding a lit marijuana cigarette in his right hand and that the marijuana smell was a "strong odor of burning marijuana." They did not actually observe Villacis smoking. Respondent Heinz recalled Villacis saying something to the effect of "it's just weed" and Respondent Moore remembered him asking for a chance to put it out. Heinz directed Villacis to place the marijuana in the cup holder and roll down the passenger window for Respondent Moore, and then instructed him to step out of the vehicle because he was under arrest. (Tr. 172-76, 200-05, 213, 237-39, 257)

According to Respondent Heinz, Villacis responded, "I'm not stepping out of the vehicle," as he reached for the glove compartment. Respondent Heinz told him not to reach for anything and to step out of the vehicle. Villacis replied, "don't you need my license;" Respondent Heinz told him "I just need you to step out of the car, you're going to be under arrest." Villacis repeated that he was not getting out of the car and again reached for the glove compartment. Respondent Heinz testified that he told him to stop reaching and put his hands on his thighs, advising that he was going to open the car door. He also motioned with his hand for Respondent Moore to come assist. (Tr. 175-76, 206, 210-12, 240)

Respondent Heinz unlocked and opened the door. He contended that Villacis, who was still wearing a shoulder and lap seatbelt turned in his seat, "put his hands towards me, put one leg up towards me on the rocker, like a defensive maneuver." Respondent Heinz again directed him to get out of the car, warning that if he did not exit the vehicle, "I'm going to have to remove

you..." Villacis, Heinz recalled, said he was not going anywhere and began to reach for the glove compartment again. (Tr. 176-77)

At that point, Respondent Heinz grabbed onto Villacis' upper left bicep and began to pull him towards the car door. He testified that Villacis ripped his arm out of his grip, pushed him away and kicked him with his left leg. He gripped onto Villacis' bicep a second time and pulled, but Villacis again ripped his arm away and continued kicking. Respondent Moore confirmed that he observed Villacis pushing and pulling away. Respondent Heinz noted that this went on for about 20- 30 seconds, at which point he realized he was not going to be able to remove Villacis from the vehicle because of the seatbelt. In an attempt to get "across him [to] unclip the lap belt," Respondent Heinz took his left knee and "got into the car sideways so I'm facing him and put my knee across his two legs so he can't kick me anymore." He asserted that Villacis continued swinging his hands, pushing and punching him, striking the left side of his neck and jaw.<sup>4</sup> He further detailed, "to overcome his resistance, I used a one hand strike on him" to the right lower cheek area. He stated that he struck Villacis with a loose fist; Respondent Moore testified that he did not observe the strike. After the strike, Villacis' hands came back towards his face and Respondent Heinz reached and unclipped the seatbelt. (Tr. 176-78, 216, 220-21, 242-43, 261)

Respondent Heinz then removed himself from the vehicle, keeping his hand on Villacis' left bicep "in the hopes that I would be able to finally get him out." He contended, though, that Villacis continued kicking and turned almost all the way over in his seat to where his back was almost over the center console. Respondent Heinz then began pulling on his pants pocket,

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<sup>4</sup> Respondent Heinz stated he only experienced minor redness to the affected area and no swelling or bruising. He also stated he did not note that Villacis struck him on his TRI report because he did not believe that Villacis was trying to cause him substantial pain or serious physical injury. (Tr. 219-20)

ripping the pants. It was then that Respondent Moore, who had come over to the driver's side but had no room to get into the scuffle, removed pepper spray from his belt and warned his partner, "watch out I'm going to spray." After a one second burst of OC spray, Villacis covered his face and turned to come out of the vehicle as Respondent Moore was pulling his arm to remove him. Villacis and Respondent Moore went to the ground with Villacis falling chest first. Respondent Moore stated he did not believe Villacis was trying to flee at that point. (Tr. 179-81, 221-24, 241-42, 261-64)

Both Respondents specifically recalled wrestling with Villacis on the ground as he clenched his hands under his chest. After about 10-15 seconds, Respondent Heinz was able to get his hands between his rib and bicep, pull his hands out and cuff him. Respondent Moore held up Villacis' pants as he escorted him to the van; Respondent Heinz briefly checked the glove compartment to secure the car before it was brought back to the precinct. Villacis did not ask for EMS and they were not called to the scene. After calling a sergeant to come verify the arrest, they returned to the PSA 8 stationhouse where the desk sergeant instructed Officer Moore to have Villacis wash his eyes out in the bathroom. Neither Respondent heard Villacis make any complaints to the sergeant about force used or injuries. Respondent Moore processed the arrests and transported Villacis to the hospital where he remained with him for about three hours before returning him to the precinct, at which time he was taken to Central Booking (Tr. 181-83, 190-91, 223-26, 243-51, 264)

Regarding the cell phone photos in evidence (CCRB Exs. 3-5) that Villacis claimed to have taken, both Respondents confirmed they depicted Villacis in the cell lodging area and Moore agreed that Villacis was wearing a black shirt and jeans in both the photos and on the day of the incident. Respondent Moore testified that he did not allow Villacis to use his cell phone at any point inside the holding cell, though he acquiesced that he was not with him at every

moment and did not know whether another officer could have let him access the phone.

Respondent Heinz testified more generally that he had processed over 100 arrests and that a prisoner in custody would never be permitted to use his personal phone in the cell area for both safety and evidentiary integrity reasons. (Tr. 266-68)

Both officers confirmed that Villacis was not charged with driving under the influence. When asked on cross whether he believed Villacis was "high at this point," Respondent Moore testified, "I can't say...all I know is there was a lit marijuana cigarette in his right hand." (Tr. 258)

**Case No. 2018-18672**

Respondent Heinz is charged with wrongfully punching Brandon Villacis in the face, without police necessity. It is not disputed that he did strike Villacis in the face with a loose fist. However, the tribunal has been presented with two accounts of the context of that facial strike. Villacis asks the court to believe that as he was trying to retrieve his identification and was attempting to comply with directions, he was punched multiples times both inside the vehicle and later on the ground. He does admit though to ignoring commands to immediately exit his vehicle. Conversely, Respondent Heinz testified that a struggle ensued after Villacis ignored multiple directives to exit his vehicle, that he put his hands on him to physically remove him from the car, and that he struck Villacis on the right side of his face as he continued to resist exiting the car. Both Respondents confirmed wrestling and grappling with Villacis on the ground for approximately 30 seconds until they could grasp his hands and cuff him. For the following reasons, I find Respondents' accounts to be vastly more credible and that the single punch deployed by Respondent Heinz did not constitute actionable misconduct.

I do not doubt that Mr. Villacis felt genuinely aggrieved by this encounter. This is evidenced by his decision to travel from Florida to provide in-court testimony without any pecuniary gain or pending lawsuit. He answered questions candidly, admitting personal details about his drug use and his struggle with homelessness. However, his reliability as a narrator is questionable on multiple fronts. He admitted to being a habitual drug user, smoking multiple times daily, for several years at the time of the incident. Marijuana was plainly visible inside his vehicle. He further admitted to experiencing some confusion and memory loss or "blur" during the course of the altercation. He also made certain statements at trial about "police... always trying to find something against somebody for [something]" that indicated some degree of bias or, at minimum, mistrust of law enforcement.

Moreover, his narrative was highly implausible on the facts he alleged. It simply does not make sense that Respondent Heinz, without any provocation or initial aggression from Villacis, would begin throwing multiple punches at an individual who was simply trying to locate his documents and then continue to punch that individual on the ground when he was not resisting and pleading for the officer to stop, as Villacis claimed.

Finally, Villacis' account of a prolonged facial beating lacks any corroboration, even though he was examined at a hospital the day of the incident. Assuming that Villacis did snap "quick selfies" in the precinct as he claimed, they depict a few minor abrasions and redness on the right side of the face. These abrasions are not noted in the medical records; those records contain no mention whatsoever of any facial or jaw injury and no complaints regarding pain in those areas. There is no reference in those records to him being punched or struck in the face.

The injuries depicted in the photos are, however, wholly consistent with Respondents' account of a singular strike to Villacis' right check and additional wrestling and tussling on the ground, where Villacis was chest-down as they attempted to cuff him.

Respondent Heinz testified in a professional, logical and forthright manner about the steps he took to remove Villacis from his vehicle and place him under arrest, much of which was corroborated by Respondent Moore. It is clear to the tribunal, and confirmed to some degree even by Mr. Villacis, that he did not comply in stepping out of the vehicle after marijuana was observed inside. I further credit the testimony from both Respondents that Villacis was pushing Respondent Heinz and pulling away and kicking to avoid being removed from the vehicle. Under these circumstances, Respondent was justified to use some force to remove him from the vehicle and effectuate the arrest. I credit his testimony regarding the use of a single facial strike in an effort to gain compliance from an individual, who was growing increasingly agitated. Under the circumstances, the force used was justified and measured, especially given the very minor and superficial injuries to the face. Accordingly, I find him Not Guilty.

**Case No. 2018-18674**

Respondent Moore is charged with wrongfully using force in unlawfully using pepper spray against Villacis (Specification 1 - citing to Patrol Guide 221-02, page 2, paragraphs 10, 11 and 12) and with wrongfully using force by improperly using pepper spray against Villacis. (Specification 2 – citing to Patrol Guide 221-07, page 2).

Patrol Guide 221-07, page 2, paragraph 1(a) provides that the use of O.C. pepper spray is proper when a uniformed member of the service reasonably believes it is necessary to “gain or maintain control of persons who are actively resisting arrest or lawful custody or exhibiting aggression.” “Active resisting” is defined on page 1 of this Patrol Guide section as including, “physically evasive movements to defeat a member of the service’s attempt at control, including bracing, tensing, pushing, or verbally signaling an intention to avoid or prevent being taken into or retained in custody.”

Respondent Moore has admitted that he did use pepper spray against Villacis while he was still in his car. As discussed above, based on the credible evidence in this case, Villacis was actively resisting being arrested by physically taking actions to prevent Respondents from removing him from his car. Respondent Heinz tried to pull Villacis out of the car by himself, but was not successful because Villacis was pulling away and kicking at Respondent Heinz. It was only after Respondent Heinz failed in his attempts to gain control of Villacis that Respondent Moore used the pepper spray. I find that under the circumstances, his use of the spray was an appropriate use of force as Villacis was still actively resisting arrest and other uses of force, such as Respondent Heinz's pulling on Villacis and his single hand strike, had failed to allow the Respondents to gain control of Villacis. Respondent Moore is therefore Not Guilty of Specification 1.

With regard to Specification 2, CCRB argued in summation that Respondent Moore's actions, in using pepper spray inside a vehicle and his failure to issue a warning prior to using the spray, were inappropriate. CCRB also emphasized in its opening that no medical attention was provided at the scene, specifically noting that no eyewash was done for the pepper spray. (Tr. 7)

It is undisputed that Respondent Moore did use pepper spray inside Villacis' car. The Patrol Guide contains a note that says a member of service should avoid using pepper spray in small areas such as automobiles. This language is not the language of an explicit prohibition. As such, it is guidance and in this case, the pepper spray had to be used in the car because that was the area that Villacis refused to leave to allow the Respondent's to effectuate their arrest.

As to CCRB's argument that Respondent Moore's failure to warn Villacis he was going to use pepper spray was inappropriate, again the language used in the Patrol Guide (on Page 1 – not Page 2 as cited in the Specifications) reads that members of the service “should advise the offender that O.C. pepper spray will be used to handcuff/restrain him/her before applying such

force, if feasible."(emphasis added) The language makes clear that the prior warning is not an express requirement. Moreover, in this case, Respondent Moore did announce, even if his intention was to warn Respondent Heinz, that he was going to use the pepper spray.

Finally, as to the issue of medical attention and the lack of eyewash at the scene, the Patrol Guide does require, after pepper spray is used, that an officer "request the response of EMS once the situation is under control" and "advise person sprayed that EMS is responding." P.G. 221-07, page 2, para 3. Respondent Moore was explicitly asked whether EMS was called to the scene "for an eyewash" and he admitted that neither he nor his partner called EMS even after Villacis was cuffed. This was also confirmed by Respondent Heinz. (Tr. 226, 264-65)

Given this failure to follow clear Patrol Guide procedure, I find Respondent Moore Guilty of Specification 2, not for a wrongful use of force, but for not properly following the Patrol Guide regulation which requires the request of an EMS response after pepper spray has been used on a person.

### PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on March 1, 2000. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

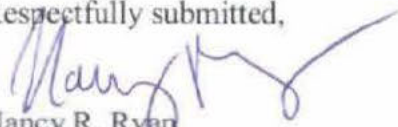
The tribunal has located no analogous precedent where the use of O.C. spray was determined to be a proper use of force, but there was a technical violation of a Patrol Guide procedural requirement related to its use. Having carefully considered the specific circumstances of this case, I recommend a penalty of the loss of one vacation day.



POLICE OFFICER JIMMIE MOORE  
POLICE OFFICER MICHAEL HEINZ

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Respectfully submitted,



Nancy R. Ryan  
Assistant Deputy Commissioner Trials

**APPROVED**

NOV 20 2019



JAMES P. O'NEILL  
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM  
POLICE OFFICER JIMMIE MOORE  
TAX REGISTRY NO. 925771  
DISCIPLINARY CASE NO. 2018-18674

Respondent was appointed to the Department on March 1, 2000. On his last three annual performance evaluations, he received 4.5 overall ratings of "Highly Competent/Extremely Competent" for 2014, 2015 and 2016. He has been awarded four medals for Excellent Police Duty and one Commendation. [REDACTED]

Respondent has no formal disciplinary record. From April 21, 2011 to May 4, 2012, he was subject to Level 1 Performance Monitoring due to a negative performance evaluation. More recently, Respondent was placed on Level I Force Monitoring on September 19, 2018. Monitoring remains ongoing.

For your consideration.

Nancy R. Ryan  
Assistant Deputy Commissioner Trials